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THE DISTRICT AUDITOR

AN OLD MENACE IN A NEW GUISE

WILLIAM A. ROBSON.

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THE DISTRICT AUDITOR.

AN OLD MENACE IN A NEW GUISE.

By WILLIAM A. ROBSON.

The average individual regards certain words, and the subjects which they connote, with an instinctive and deep-rooted aversion. The word "drains" is one example of a topic intuitively avoided by the normal human mind, the word "audit" another. It is infinitely more difficult to arouse even the faint glimmering of an interest in the subject of drains or the process of auditing than it is to obtain a feverish discussion on a "personal" question such as "Should a Doctor Tell?" or "Did Shakespeare write Bacon?" or something of that kind.

Despite the considerable initial inertia to be overcome in doing so, it is important that the subject of the relationship of the District Auditor to the organs of local and central government should be discussed. For in public affairs the method of audit may, as we shall see, constitute an exceedingly important form of control; and the title "auditor" or the even more disarming phrase "District Auditor" may denote an official who beneath sheep's clothing conceals a multitude of—powers. I venture to think, indeed, that if the powers which the District Auditor claims, and often actually exerts, were indicated more adequately in his official title; if the peculiar, bureaucratic and tyrannical position which he has come to occupy in the structure of our governmental system were not disguised by nomenclature which suggests a harmless ledgerworm riding round on a bicycle and checking accounts behind horn-rimmed spectacles, it is improbable that the District Auditor would be tolerated in this country for a moment, or at any rate be permitted to occupy his existing anomalous position.

What is that position? One of the curious facts about the whole matter is that it is impossible to define it with any exactitude. Even the massive and encyclopædic Lumley is obliged to confess "that the law as to the limits of an auditor's power to surcharge is in a somewhat unsettled condition."

We know that District Auditors were first established in the second quarter of last century to audit the accounts of Boards of Guardians and that the Poor Law Audit Act enabled the Poor Law Commissioners set up under the Act of 1834 to hear appeals against the auditors' decisions. In 1875 Disraeli's great Public Health Act created the urban and rural sanitary authorities out of the local Boards, the Improvement Commissioners and other embryonic municipal organisations, and specifically applied the Poor Law system of district audit to the new sanitary authorities set up thereunder. The Local Government Acts of 1888 and 1894 took further steps in the same direction and applied the system to the new local authorities which were subsequently established, namely, the County Councils, the District Councils, the Parish Councils, and Parish Meetings; and the London Government Act, 1899, applied the system to the Metropolitan Borough Councils. The Education Acts even went so far as to extend the jurisdiction of the District Auditor to the Education accounts of the Municipal Boroughs which, with a characteristic insistence on ancient privilege, had in other respects managed to evade the growing power of the new central accountant and to conduct their so-called audit by means of a weird system of elective Auditors which combined all the least efficient features of democracy with an entire absence of its practical advantages. A similar provision has also been made in regard to the housing accounts of municipal boroughs.

In 1879 the Local Government Board was by statute* empowered to appoint and to remove the District Auditors; to assign to them their duties; and to make regulations respecting the method of audit. The salar-

* The District Auditors' Act, 1879.

ies of the Auditors are really paid largely by contributions from the local authorities whose accounts are audited, although nominally the Auditors are remunerated out of Parliamentary monies.

The really important section in all the Acts relating to the District Auditor is Section 247 (7) of the Public

Health Act, 1875, which reads as follows:

"Any auditor acting in pursuance of this section shall disallow any item contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case, certify the amount due from such person, and on application by any party aggrieved, shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made."

The next sub-section provides that any person "aggrieved by disallowance"—a somewhat quaint expression—may either apply to the High Court for a writ of certiorari or appeal to the Minister of Health. The writ of certiorari is a technical term for a quite simple but rather expensive method of appealing to the Judicature to quash the disallowance or surcharge on legal grounds; whereas the appeal to the Minister, which also exists, would appear to be a cheap method of requesting the executive government to squash the audi-

tor on human grounds.

In the very year that the Public Health Act of 1875 was extending the jurisdiction of the Auditor to new classes of local authority, a very remarkable decision in the courts* established the important fact that the Auditor is entitled to his costs out of the rate-payers' money in taking legal action to enforce the recovery of surcharges made by him, no matter how misguided or unwise, or foolish his method of procedure may have been. For, said Mr. Justice Mellor, "it

^{*} Prest v. Royston Union. 33 L. T. (N.S.) 564.

would be hard upon that officer if he were to lose his costs because he did not take the most judicious course in performing his duties." All the judges suggested that he had behaved absurdly in this case, but they nevertheless gave him his costs; and there is no doubt that the protection thus afforded to the Auditor considerably strengthened his position. The situation now is that if a disallowance and surcharge is made by a District Auditor which the Court on appeal quashes, the District Auditor, though unsuccessful, is entitled to recover his costs from the ratepayers unless the Court makes an order to the contrary, which it will apparently only do if the Auditor is guilty of legal negligence or misconduct. On the other hand, if the Councillors are unsuccessful in the appeal, and are held technically to have exceeded their legal powers, they have inevitably to bear the cost personally though they may not be guilty of any negligence or misconduct whatever. The District Auditor is thus in practice free from personal liability, though in an extreme case he might conceivably be deprived of his costs.

Judging from the course of legislation the Auditors must have become slightly intoxicated, metaphorically speaking, at the prospect offered them of so many new worlds to conquer, and restive of control even by what is nominally their own Department; for by 1887 it had become necessary to pass a special short Act of Parliament which expressly laid it down that no District Auditor should disallow expenses incurred by a local authority if the expenditure had been sanctioned by the Ministry of Health. It is an amazing fact that the District Auditors had already become so independent of the Minister who not only appointed and dismissed them, but who also had statutory authority to regulate the method of audit, that it actually required no less an instrument than an Act of Parliament to compel them not to attempt to over-ride the Minister's discretionary power. One result is that no one now knows what is the exact relationship between the District Auditor and the Minister of Health. Sometimes the former appears to represent the Department's point of view, at others he is independent or even antagonistic. But since there is an appeal to the Minister over the Auditor's head, it is clear that the Auditor is not a departmental official, whatever else he may be. Yet he

may be removed by the Minister at will!

It is perfectly obvious that the Auditor has, and always has had, a duty to disallow and surcharge payments which are ultra vires in their nature: that is, expenditure on an object, such as a shop for example, on which a local authority has no legal permission to spend money. It is equally obvious that he must disallow and surcharge any deficiency or loss arising from negligence or misconduct on the part of Councillors or their servants. All that is admitted. The crux of the whole matter is this: Can an Auditor say to a Council "This payment becomes unlawful when I say it is unreasonable. I say it is unreasonable because if I had been in your position I should have acted differently. Any expenditure which is in serious conflict with my opinions as to what is socially desirable, thereby becomes unlawful unless expressly authorised by Parliament or the Government, and may be disallowed and surcharged." This may appear a somewhat fantastic exaggeration of the Auditor's claim to power, but in reality his pretentions come to nothing less. Take the recorded instances—many of them never tested in the Courts—for a few examples.

In 1912, the District Auditor, in auditing the accounts of the L.C.C., ruled that such items as fruit, cod-liver oil, extract of malt, were not food within the scope of the Education (Provision of Meals) Act. His opinion happened to differ from that of nearly all the Medical Officers of Health, but that did not influence him. It was not until the Auditor had been persuaded by the largest and most august local governing body in the world into admitting that fruit might be regarded as a constituent part of a meal—many people live on nothing else—that the expenditure became lawful in his eyes. The L.C.C. was, however, actually forced to abandon the supply of cod-liver oil and malt extract to necessitous children merely owing to the special bias

of the Auditor's dietetic opinions. In 1887* an auditor thought the payment of a commission of 14 per cent. for raising a loan excessive and surcharged the guardians concerned. In 1908 an Auditor† found that a local authority had accepted certain tenders which were not the lowest submitted. This startling discovery led him to ask officially why they had acted in so appalling a manner. The Committee concerned very properly declined to give reasons and the Auditor promptly surcharged the members of the Council. In 1921-2, the Poplar Borough Council, exercising their discretion under the Metropolis Management Act, 1855, which enabled them to pay their officers such remuneration "as they may think fit," fixed a minimum wage of £4 a week for all municipal employees. The auditor ruled that the wages were unlawful because he regarded them as exorbitant (they were considerably higher in some cases than the then prevailing industrial awards) and surcharged the Council £5,000.

It is quite clear from these few examples what are the District Auditor's conception of his own office. He is in his own eyes a sort of uncrowned king of local government; and the sphere of his authority extends not merely to the disallowance of ultra vires payments, the prevention of negligence and corrupt practices, the ensuring that proper accounting methods are adopted, the giving of advice as to ways in which economies could be effected, but also to the control of discretion, and the regulation of administration. What is far more difficult to discover is the view taken by the Courts of the Auditor's powers. "I certainly am not inclined," said Mr. Justice O'Brien in an Irish case, 1 "in the least degree to derogate from the authority of the Auditor ... or to narrow his authority so that he could not deal with all payments of an unnecessary and extravagant kind." But what, one would like to know, is the test of what is "necessary?" Is the criterion to be the personal opinion of an official like the Auditor: or is it to be the collective will of the democratically

^{*} R. v. Hazlehurst, 1887. 51. J.P. 645. † R. v. Roberts, 1908: 1 K.B. 407. † R. v. Calvert, 1898. 2 I.R. 525.

elected members of the local council, responsible to their constituents?

The dicta of O'Brien I. was quoted with approval by Chief Baron Palles in the King v. Newell,* another Irish case. "Neither am I," he said, "inclined to derogate from or narrow the authority of the Auditor . . . It is not pretended that any Statute has fixed any of the actual rate of daily subsistence allowance: therefore the only amount legally allowable is a reasonable sum. . . . What is a reasonable sum is a matter of fact which the Auditor must himself determine." It is true that the Auditor must be guided by the circumstances of the case and may not himself arrive at an arbitrary or capricious decision, but the same considerations are available to the Councillors. In other words, where a conflict of opinion occurs between the Auditor and his victims the councillors, it is the Auditor who is presumed to be so richly endowed with the accumulated wisdom of the ages, so fully versed in logic and the inner workings of the mind of the goddess of reason, as to be the one who can and must decide whether what the Council think is reasonable really is reasonable, having regard to the circumstances.

It is possible to trace during the past fifteen years or so a growing uneasiness on the part of Judges of the High Court at the inroads made on the discretionary freedom of local councillors by the District Auditor and a growing determination to curtail his power more drastically than was ever attempted by their predecessors. "No doubt if a payment is excessive," remarked Lord Chief Justice O'Brien in the King v. Brown,† "a surcharge can be made for the excess." "But," he went on to say, "as a local authority are responsible only for crassa neglentia the standard of care to be demanded of them is not higher than that required from Company Directors. The degree of negligence which subjects such a body to responsibility is crassa neglentia. . . . Mere imprudence is not enough, want of judgment is not enough, grave error of judgment is not enough."

^{* 1903. 2} I.R. 342. + 1907. 2 I.R. 505.

This was going a good long way in favour of the elected council as against the nominated official, but in the following year a much more severe attack was launched against the whole position of the Auditor by the Court of Appeal in England. "The Statute," observed Lord Cozens-Hardy,* then Master of the Rolls, "has enabled an Auditor, who has in my opinion, no power to administer an oath, or to subpæna witnesses . . . to decide that a member of the local authority has been guilty of negligence or misconduct and to assess the amount of loss incurred thereby. But," added Lord Cozens-Hardy, with a pretty definite hint, "happily, this extraordinary jurisdiction is subject to review in the King's Bench Division, where the merits will be dealt with upon legal evidence."

Lord Justice Fletcher Moulton, in the same case, observed in the course of his judgment that "The true work of securing good management of municipal affairs is to induce the best men to take part in them and to give their services to the community in this way. The task is at best unremunerative, and often thankless, but if those who accept it are to be liable to have their conduct pronounced upon and their character and property injured, by decisions, not of any Court of Law of the country, to which they are, of course, amenable, but of a special tribunal consisting of an official chosen by a government department without any powers or qualifications for holding a judicial inquiry, and discharging these functions without any of those securities which protect the individual before our courts, and if the jurisdiction of that individual is not to be limited to requiring an account of municipal money for which the accused has made himself responsible, but extends to calling him to account for the reasons and motives of all his actions, no self-respecting man will take part in municipal affairs."

In the Poplar case,† Lord Justice Scrutton, in the Court of Appeal, went straight to the point when he said, "The question is not whether I should have sanc-

^{*} R. v. Roberts. 1908. 1 K.B. 407. † Rex. v. Roberts. 40 T.L.R. 769.

tioned these wages—I probably should not—or whether the Auditor or the Whitley Council would have sanctioned these wages: it is for the Poplar Borough Council to fix these wages, which are not to be interfered with unless they are so excessive as to pass the reasonable limits of discretion in a representative body." But here, again, the arbiter of reasonableness was not indicated. Lord Justice Atkin went further and openly demanded whether it was open to the Auditor to disallow the payment of 4 charwomen out of 44 if he thought 40 sufficient, or 10 dustmen out of 144 if his experience led him to believe this work could be done by 134-obviously implying that the auditor had no such authority. Finally, he quoted with approval, as applicable to the circumstance, the judgment of a judge in another case, who had said "A by-law is not unreasonable merely because particular judges may think it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges think ought to be there. Surely it is not too much to say that on matters which directly and mainly concern the people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges."

Change the word judges to District Auditor and the word by-law to expenditure, and the passage might represent our own view concerning the interference by a central official with the right of a local authority to spend whatever sums it chooses on objects permitted by Statute, providing there is no corruption or neglect.

But this view unfortunately no longer coincides with what is now the law of the land. The judgment given by the House of Lords in April, 1925, in the Poplar case has reversed the decision of the Court of Appeal and "revealed" the law of England to be such that the District Auditor was justified in holding that a Borough Council was behaving unlawfully when it adopted the policy that "a public authority should be a model employer and that a minimum rate of £4 per

week is the least wage which ought to be paid to an adult having regard to the efficiency of the workpeople, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages and other considerations which are relevant." Lord Atkinson referred in his judgment to "the vanity of appearing as model employers of labour," and observed that the Council would, in his opinion, fail in their duty if, in determining wages, they "allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour."

The importance of the case does not, however, lie in the view taken by the House of Lords as to the legal impropriety of a local authority fixing a minimum wage of £4 a week for its employees but in the wide interpretation which it was incidentally necessary for the Law Lords to give to the statutory powers of the District Auditor in order to support and enforce his point of view in this particular instance—as to the merits of which we say nothing. Lord Atkinson, for example, definitely said that the Auditor could disallow a payment of money "if it be excessive and therefore illegal." Lord Sumner, again, scouted the notion that the Council could themselves determine what is or is not reasonable. "It is not said," he observed, summarising the argument put forward on behalf of the Council, "that they can pay, if they please, unreasonable wages, but that, for all purposes, what they please is what is reasonable. Their reason is substituted as the test of reasonableness for that of the Auditor or the Courts of Law. . . . The result is that expenditure which is in fact wholly unreasonable is on this view not contrary to law if the Council bona fide choose to incur it. This is a pure paradox "-a paradox, we might point out, on which the whole structure of democratic government depends. Speaking of the duty of the District Auditor, Lord Sumner remarked, "His mission is to find if there is any excess over what is reasonable."

In a later passage the same learned Law Lord goes to unprecedented lengths in curtailing the power of the elected members of the Council. He agrees with another judge that the Auditor cannot claim to control questions of policy, but only matters of administration. He points out that "The word however, is policy, not politics," and "I can find nothing in the Acts which authorises them (the elected members of Local Authorities) to be guided by their personal opinions on political, economic, or social questions in administering the funds which they derive from levying rates." He concedes, however, that they may still decide questions of policy. Questions of policy, Lord Sumner understands to mean "such matters as the necessity for a urinal and the choice of its position, provided no public

or private nuisance is created."

If this statement of the legal limits to the discretionary power of the democratically elected members of municipal bodies were to be extensively applied and rigidly enforced, Local Government in England would be at an end in a day. If local councillors were to be prohibited from following their personal opinions on social and political questions in spending money raised by the rates, the Council Chambers of the cities and the counties would be empty in a moment. It is only the possibility of converting political opinion into concrete reality, of putting precept into practice, that persuades men and women to make that continual sacrifice of time and effort, and yields that perpetual discussion on press and platform, which is essential if the system of municipal government is to be kept in healthy running order. Since, however, such a process is apparently against the law of England; since it has been laid down by the highest legal tribunal that the power of a Council to spend money "as they may think fit " means, outside a narrow discretionary limit, as other persons think fit—in particular the District Auditor, and the Courts of Law—we can only say that the sooner the law as it at present stands is changed by Act of Parliament the better. No democratic country can permit its local governing bodies to remain in a position of such humiliating impotence in the eyes of the law, nor expose their councillors to such dire financial penalties,

and expect them to retain their self-respect.

In view of the likelihood of a considerable extension of the functions of local governing bodies during the coming decade, and of a broader conception by local councillors of their social responsibilities, it is extremely probable that severe conflicts will take place in the near future between the District Auditor and members of progressive councils. It is in the interests of all persons who believe in the continued expansion of democratic local government to resist by all legitimate means the growing incursions made by this select bureaucracy of District Auditors on the unfettered freedom of the elected council. The whole subject needs careful consideration and will, one hopes, come under the purview of the Royal Commission on Local Government in due course. In my opinion, one essential reform that is needed is that the District Auditor should be definitely subjected to the direct authority of the Minister of Health; but even this would by no means effect all that is needed in view of the decision in the Poplar case. The signatories to the Minority Report of the Royal Commission on the Poor Law pointed out that the District Auditor "has been tempted to stretch his legal powers so as to disallow and surcharge in questions of policy and administration when he ought only to report," and recommended that the power to disallow and surcharge should be authoritatively specified and scrupulously observed, and his power to report and advise greatly extended. That was nearly fifteen years ago. The need to-day is far more urgent and far more important having regard to the fact that the highest legal tribunal in the land has set the seal of its approval on what the plain man in the street can only regard as a disastrous interference by an appointed bureaucrat—the District Auditor—in the free and spontaneous discretion of elected councillors to carry out their work in their own way (apart from corruption or an attempt to exceed their statutory functions) and responsible only to public opinion and their own constituents

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